88-223

In The

Supreme Court of the United States

Supreme Court, U.S.
FILED
AUG 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

LEONARD J. KERPELMAN,

Petitioner

vs.

STATE OF MARYLAND,

Respondent.

October Term 1987

No.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

LEONARD J. KERPELMAN
2403 W. Rogers Avenue
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In Proper Person

45

1. (a)

Questions Presented for Review

The Petitioner is engaged in a most difficult legal specialty: representing men in domestic litigation including custody and today's popular (and ordinarily false as to the genetic father) charges of child sexual abuse, and "kidnapping". In properly doing this work he has somehow not endeared himself to a state judiciary which he finds to be constantly and significantly biased against his clients. He also has the distinction, in a state noted for its judicial conservatism, of having been counsel before this Court in the School Prayer Case.

As a result, Petitioner alleges -or for unknown other reasons - strange things have happened to him professionally, for he is, withal a quite normal fellow.

The strangest of these has to do with his conviction and sentence for contempt of court as set forth in the following "Questions Presented".

1. Terms and circumstances of the case:

(a) A criminal trial.

(b) An explicitly hostile court.

(c) A beleaguered attorney (the Petitioner) seeking to protect and advocate the proper legal position of a criminal defendant against the overtly hostile court.

(1) The defendant (not the Petitioner) was a father

(2) With a valid, jurisdictionally correct, California Decree granting custody to himself;

(3) But he had been charged with "Felony Parental Kidnapping" under Maryland state law, when he picked up his children, in Maryland, California Decree in hand; it was strenuously disputed

that any Maryland temporary or permanent custody Decree then applied;

(4) He had been extradited to Maryland for trial

(5) Where he declined to be tried by the court

(6) But chose a jury of his peers

(7) And non-local (from a far county) non-lay-down-and-die counsel, whom he trusted,

(8) Which counsellor (the Petitioner) had practised law for over 30 years,

(9) And whose record contains no former conviction for contempt of court.

(d) The Petitioner, in the midst of the difficult and acerbic trial was summarily convicted of criminal contempt,

(e) But several days later was denied the right to be represented by skilled counsel of his choice at sentencing

(1) In violation of the decisions of the federal local Fourth Circuit Court of Appeals,

(2) And of other circuits and of the Maryland Court of Appeals itself.

(f) Whereupon, counsel, the Petitioner, was sentenced to jail,

(g) Which is the first such confirmed sentence of an attorney in the entire history of the state, it is believed,

(h) And appears to have been part of an effort by the court to get the jury to convict, for at the end of the case, the court used the criminal conviction unlawfully to secure a civil result: namely, the return of the

children to Maryland in defiance of the California court's jurisdiction.[1]

---

[1] Transcript Vol. II of the underlying criminal case (part of the Record in the appellate court), at pp. 194-198.

THE COURT: (H)e has now been convicted, he's facing three years in jail. ...

What is the status with the children? ...

(PETITIONER): They are in California, Your Honor.

THE COURT: All right, if he can get them back here in --I'm going to remand him to the custody of the sheriff pending the return of those children. ...

How long will it take you to get the children back here?

The judge of the California court, on the other hand, had been actively objecting to Maryland's assumption of jurisdiction. Unquestionably. Same Tr. Vol. II, pp. 165-170, where the court master who had conferred with the California judge refuses to answer questions about the conference.

(i) And if the conviction remains there is no question but that it will be used to seek the disbarment of the Petitioner. That proceeding has already been begun. Maryland Attorney Grievance Commission Docket BC 87/342-4-7.

Question 1:

Was the jail sentence, imposed on Petitioner, without benefit of counsel to argue against the harshness of it and its general chilling effect on the practise of law, among other arguments, a violation of the Petitioner's federal Due Process and Sixth Amendment right to counsel?

Subsidiary Question 1:

Is this ominous, historically unique sanction against an attorney, unlawfully imposed by the court without benefit of counsel, a

harbinger of an even further unlawful extension of judicial power designed to control the practise of law and to chill the right of citizens to vigorous and ethical representation by independent counsel?

2. Same Terms and Circumstances set forth in 1. (a), (b), (c) and (d); and

(j) State law (by court Rule) provides that a charge of contempt is to be expressed in an "order" setting forth "facts" which are to provide the basis for appellate review (this Rule is required by Due Process decisions of this Court)

(k) But the trial court instead issued an "order" setting forth both a simple contempt case --refusal to comply with the court's oral directive --and the charge that the

Petitioner engaged in conduct which was

> "rude", "arrogant", "contemptuous", "obnoxious", "angry", "spiteful", "outrageous", "impolite" and "impossible to accurately describe" (A15-25, esp. A16, 21, 25 Order of Contempt).

(l) None of which was borne out by the transcript of the trial, but on the contrary, all of the examples cited by the trial court are refuted in the record as being either negligently stated, or even consciously falsely stated (Petitioner's Affidavit A30-49), and

(m) The state, at oral argument had abandoned any contention that the contempt charge was other than the violation of the one oral directive, but

(n) Nevertheless the appellate court chose to specifically rely on the

conclusory and pejorative characterizations of the trial court, and made a formal finding that these characterizations "serve(d) to supplement the judge's findings with regard to the intent and purpose (of the) contemptuous act", Slip Opinion, p. 7 (A13).

Question 2:

Was this specific reliance of the appellate court on the pejorative, vague and conclusory language in (k) a denial of Due Process of Law?

The following question is not one upon which the court is at all likely to grant certiorari. It is included only to preserve the matter for argument if the petition is otherwise granted.

Please skip this material for now.

Resume at p. xii.

3. Same terms and circumstances set forth in 1.(a), (b), (c); and

(o) After the delivery of an unreasonably ambiguous admonition,

(p) Which any reasaonbly intelligent attorney would probably have misunderstood or not understood, and which Petitioner has sworn he did misunderstand

(q) Followed substantially later (eighteen pages later in the transcript) by an incident in which the judge can well be said to have facially misunderstood the attorney's action and so convicted him of contempt; and

(r) The attorney can well be said to have facially misunderstood the judge's oral prohibition and so was convicted of contempt.

Question 3:

Was it a violation of federal Due Process to convict the Petitioner of contempt under those circumstances?

Subsidiary Question 3:

When the consequent chilling effect of convicting a trial attorney of contempt is on the citizen's right to a jury trial and to the assistance of vigorous, independent counsel under the Fifth and Sixth Amendments, should the evidence under the standard of "proof beyond a reasonable doubt" (this is both the state and federal standard) also be said to require under Due Process that where there is a conflict between the court's charge and the alleged contemnor's sworn statement which can reasonably be resolved either way, that all fact questions and all disputed interpretations of facts must be

resolved in favor of the alleged contemnor to prevent unreasonable power over the bar from lodging with the bench? This is believed to be a new, but important jurisprudential proposition. (It is not believed, as has been pointed out that the court would be ready to grant certiorari on this point alone. Questions 1 and 2 concern far more egregious, and less complex, sins.)

1. (b)

All Parties Below

These are the Petitioner, representing himself, and the State of Maryland represented by the Attorney General of Maryland.

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Opinion Reported

The Opinion of the Court of Special Appeals of Maryland is appended hereto at pp. A1-A4; it is an "Unreported Opinion" of the appellate court and does not therefore appear in any of the case reports.

(e)

Grounds for Invoking the
Jurisdiction of the Supreme Court

(i) and (ii)

Judgment nisi was entered in the Court of Special Appeals of Maryland December 21, 1987; this judgment became final upon the issuance of the Mandate of the Court dated January 20, 1988.

There is no appeal granted by state law as a matter of right from the final judgment of January 20, 1988, and hence, this Petition for Writ of Certiorari to this Court.

(iv)

Jurisdiction to review the judgment in question is believed to be conferred by Title 28 USC Sec. 1257(3):

> Final judgments or decrees rendered by the highest court of

a state in which a decision could be had, may be reviewed...

(3)by writ of certiorari, where ...any ...right, privilege or immunity is ...claimed under the Constitution ...of the United States."

(f)

Constitutional Provisions, Statutes, Etc., Involved

Fifth and Sixth Amendments U. S. Constitution: Due Process, right to counsel, right to jury trial.

Fourteenth Amendment U. S. Constitution: Due Process.

"Maryland Rules" (Rules of the Court of Appeals of Maryland):

Rule P3b. "Order of Contempt:"

"When a direct contempt is committed, the court shall sign a written order to that effect. The order shall recite the facts, be signed by the judge and entered of record. The order shall state which of the facts

were known to the court of its own knowledge and as to any facts not so known, the basis for the court's finding with respect thereto."

and P3c. "Record":

"The record in such cases shall consist of

(1) such order of contempt,
(2) any affidavit filed by the defendant...
(4) any testimony... ."

(g)

A Concise Statement of the Case

This has been done in the expression (above, pp. i et. seq.) of the "Terms and Circumstances of the Case."

(h)

How the Federal Questions Were Raised and Decided

1.

Right to Counsel

In the Court of First Instance:

Proceedings: Misc. No. 6873

Tr 4 (PETITIONER): I have engaged the services of Mr. Eugene Zoglio ...and he is unable to appear (today).

THE COURT: He called me yesterday and I advised him that ...the matter was set this morning ...and we are going to proceed...

Tr 5 (PETITIONER): ...I conferred with Mr. Zoglio. He is very anxious to represent me. I am very anxious to be represented by him. I ...need his services. He would be available in a very short time. He would be available on the 10th, or on the 13th, and --

(This would have been within eight days.)

THE COURT: I gave you ...an extra day. I do not intend to continue the matter any further ...I don't even know whether or not you have a right to counsel...

(PETITIONER): Your Honor is giving it with one hand and taking it back with the other.

THE COURT: No, I am not either. I gave you from Tuesday until this morning (Thursday) to get counsel.

(PETITIONER): I was unable to arrange counsel in that very brief period of time. (A53 - A56)

In the appellate court (P. 6 of the Slip Opinion) the court states:

> ...Appellant argues that the trial court deprived him of his right to assistance of counsel. ...This argument assumes that appellant had a right to counsel. It overlooks the fact that appellant was punished for direct contempt. The trial court was thus authorized to impose sentence with no hearing at all. ... State v. Roll and Scholl, 276 Md 714, 734 (1973). In light of this, there is no need for the services of an attorney to protect the contemnor. (Emph. supp.) (A11-A12)

2.

Vague, General, Conclusory and Pejorative Language of the "Charge"

In the Court of First Instance:

Proceedings: Misc. No. 6873

> Tr. 16 (PETITIONER): ...I was not informed that the citation was for a course of conduct. ...(A65)
>
> Tr. 19 Your Honor got me off the track. Your Honor did not tell me I was coming here today to defend a pattern of conduct. Nor did Your Honor, respectfully, admonish me that before citing me for contempt. ...That was not fair. Whether it is in keeping with the law of contempt or not, it wasn't fair. (A66)

By virtue of the court's refusal, Petitioner was not being represented by counsel at this point. Mr. Zoglio, Petitioner's choice, would undoubtedly have been cool and objective enough to specifically refer to Due Process.

In the appellate Court (p.7 of the Slip Opinion) (A13), the court holds:

> Unlike the (Petitioner) we do not find the opinion and order or the supplemental opinion and order to be "prolix material" or "fraught with confusion". The trial judge's description of (Petitioner's) many instances of abnormal behavior during

> the trial serves to supplement the judge's findings with regard to the intent and purpose of (the) contemptuous act.

(Showing the appellate court meeting a pejorative with a pejorative and not meeting the "fairness" (Due Process) question raised at all.)

3.

Contempt

(The court is not believed to be interested in this question. Please go to p. 14)

Ambiguous Admonition and Violation Thereof Beyond A Reasonable Doubt

(Tr. Vol. II, P. 65) (Of the underlying trial):

> MR. KERPELMAN: (Of the Defendant) The State's Attorney has involved these children in several fights .. . You have been charged repeatedly --
>
> MRS. FOOTER: Objection, Your Honor, I --
>
> MR. KERPELMAN: I haven't finished the question ...
>
> THE COURT: Mr. Kerpelman, stop; do not pursue that line of questioning, it is not relevant.
>
> MR. KERPELMAN: Oh, thank you, thank you. Okay. Of course, I respectfully disagree. For the record, I believe it is very relevant. Your Honor, stop me if you want me to approach the bench, but I have a reason why I would like to suggest to the Court that it's totally relevant.
>
> THE COURT: Thank you, sir.
>
> MR. KERPELMAN: And that is the Supreme Court cases on selective

prosecution and the Supreme Court cases on vindictive prosecution, both of which fit into this case beautifully.

THE COURT: Thank you, sir.

MR. KERPELMAN: Okay. Would Your Honor wish to reconsider this Court's ruling?

THE COURT: No, I do not wish to reconsider that and I am instructing you not to pursue that line of questioning.

"Violation" of the Admonition

(Eighteen pages later at Tr. 83-84)

BY MS. FOOTER:

Q Now, you testified that back in February of 1985 sometime, the three children were all in Maryland together with your wife. Is that correct?

A What's that --yes.

Q All right. And that you came to Maryland and that you picked up two of the children. Is that correct?

A That's correct, yes.

Q And that it wasn't practical to get the third child, isn't that correct?

A "To get the third child?" What do you mean by that? I'm sorry.

Q Well, that was your statement, you said it wasn't practical to take the third child with you back to California.

A To take the third child with me back to California.

(PETITIONER):

If Your Honor please, may I approach the bench at this time?

THE COURT:

No, sir.

(PETITIONER):

All right. Well, the Court has prohibited us from bringing out the fact that Mr. Cowles was previously charged with assault --

MRS. FOOTER:

I object --

(PETITIONER):
(continuing) --and the case was dismissed.

THE COURT:

Mr. Kerpelman, don't you make another statement.

(PETITIONER):

I asked --

THE COURT:

Don't make another statement and sit down. You know that's improper and all you are trying to do is cause error and a mistrial in this case, Mr. Kerpelman.

After dismissing the jury, the court informed Appellant that he was in direct criminal contempt (Tr II, 85).

At Tr. Vol. II, P. 130 not long after the incident, Petitioner in a colloquy with the court said:

(M)ay I say I didn't understand Your Honor to tell me to stop. I understood Your Honor to tell me not to approach the bench ... and on previous occasions you told me to make the record from the trial table. ...I believed Your Honor was telling me not to

approach the bench and I therefore proceeded to make the record at the trial table.

Ruling in the appellate court (p. 5, Slip Opinion (A10)):

In the case at bar there was sufficient evidence for the trial court to be convinced beyond a reasonable doubt that appellant knowingly disobeyed one of its orders. ... Appellant's contention that he misunderstood is disingenuous. ...

ARGUMENT

A Direct and Concise Argument Indicating the References Referred to in Supreme Court Rule 17

1.

First Question Referred to in "Questions Presented":

Denial of Right to Counsel

The Maryland Court's opinion in this case is directly opposed to the Fourth Circuit (Maryland) and other federal Circuit Courts of Appeal cases:

> A contemnor, convicted or alleged, is entitled to counsel at every stage, and, at this stage of the proceeding, the sentencing stage. Johnson v. United States, 34 F2d 401, 403 and 411 (2nd Cir.) In re Kilgo, 484 F2d 1215 (1973), (4th Cir.). See Appeal of Brunwasser, 490 F2d 1068 (1973) (3rd Cir.) on the non-need for "immediate" sentencing in very similar circumstances, and on denial of the right to counsel. The case reversed.

U. S. v. Willett, (4th Cir. 1970), same. Also exactly in point Lee v. State, 56 Md. App. 613 (1983) and Rutherford v. State, 296 Md. 363 (1983) for non-lawyer defendants.

Maryland seems to have carved out an anti-lawyer exception to what it knows to be the law. This is surely constitutionally impermissible. Due Process: Lawyers are entitled to it, surely, as well as anyone else.

The Maryland court, instead, contrary to the non-lawyer cases, held herein:

> "(Appellant's) argument assumes that appellant had a right to counsel. It overlooks the fact that appellant was punished for direct contempt. ...The trial court was thus authorized to impose a sentence ...with no hearing at all. ...There is no need for the services of an attorney." (Slip Opinion ("Unreported") p.6 (All).

The Petitioner points out that he was not punished summarily, at once. It was several days later that he was denied counsel, at the disposition stage. All of the federal cases in the various circuits give the right

to counsel where the dispoition or sentencing stage has been delayed.

2.

Second Question Referred to in "Questions Presented":

Conclusory, Vague, General and Pejorative Language in the Charge

By directly relying, in its Opinion, on the trial court's rhetorical, pejorative, conclusory, vague and indefinite "finding", of "facts" (see Questions Presented herein-above p. viii) for the trial court's statement/, did the Maryland court of last resort decide the federal question (Due Process) in a way in conflict with the decisions of other state courts of last resort, or of federal courts of appeal?

It did.

It violated a principle of logic handed down by CA9 Cal. In Re Gustafson, (1979) 608 F2d 767 where the court in a contempt case had referred to counsel's "speed of delivery" and "improper argument"; which was found to be "conclusory" and "general" and insufficient to support a finding of contempt.

And see International Longshoreman's Association v. Philadelphia Marine, 88 S.Ct. 201, 389 U.S. 64, 19 L.Ed. 236 (1967), in which, while the court was indeed speaking of a decree, not a contempt charge, it neverhteless stated:

> "The judicial power is a potent weapon and when founded upon a decree too vague to be understood, is a deadly weapon..."

The Maryland appellate court's finding also violated principles laid down in many state cases:

> A declaration by the courts containing a mere finding of the ultimate facts such as that the behavior

> of the contemnor was menacing, insolent, insulting and contemptuous, or boisterous have been held to constitute conclusions that would not support an adjudication of direct contempt. 17 Am Jur 2d Contempt, P. 101. Citing Re Agaisas (Phillipine), 154 ALR 1239 Re Mettler 50 Mont. 299, 146 P. 747; People ex rel. Bernstein v. LaFetra, 171 App. Div. 269, 157 NYS 387; State ex rel. Rankin v. District Court, 58 Mont. 276, 191 P. 772; People v. Salbar, 282 Ill. App. 506; Kotowski v. Kotowski, Ill. App. 3d 231, 278 NE 2d 856 "disorderly, contemptuous and insolent"; Golden v. Superior Court, 8 Ar z. App. 25, 442 P2d 562.

In the Kotowski case (exactly analogous as are just about all of these):

> "Inasmuch as direct contempt proceedings constitute an exception to constitutional guarantees of Due Process, it is imperative in order to preserve a meaningful review that the contempt order itself contain all the factsnecessary to reveal the contumacious act."

In this case the situation is made much more definitively unjust by the fact that the trial court had "bolstered" its conclusory

charges (in the phrase of the appellate court the court "supplements his finding") (A 13) with certain "examples". These "examples", however, were, to put it mildly, distortions, or in some cases they appear to be conscious misstatements of the real facts.

In the Appendix at A 30 to A 49 , every such "example" of the trial judge is carefully, sometimes starkly, shown to be such.

This being so, and it is suggested the Appendix shows that it is, the very approval of the use of the conclusory language by the appellate court, its failure to in any way compare the general language of the trial court's charge with the record which it had before it is, must be, seen as a denial by it of federally required Due Process.

One cannot, surely, within Due Process strictures, be convicted on made-up evidence

--whose refutation is right there to be seen, in facts, not conclusions.

And, above all, this ready refutation shows the logic and worthiness of the settled rule against conclusory language and general charges.[1]

At the appellate court hearing the state had, in fact, conceded[2] that the only charge it was pressing was the single simple standard charge of an oral directive of the court being violated after a proper admonition had been given.

The appellate court, willy nilly, chose

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[1] Such as, may it be said, calling the Petitioner "abnormal"! See p. 7 Slip Opinion of Appellate Court. (A13)

[2] It is believed the proceedings were recorded on tape, as in this Court.

to pull in all of the generalized material brought in by the conclusory charge, and to approve it. It erred, and did so contrary to the cases cited above in the 9th Circuit, and in the many state cases.

3.

Third Question referred to in "Questions Presented":

Was the Contempt Conviction Had on Evidence Sufficient Beyond a Reasonable Doubt, and By Due Process?

On the Contempt

The Court is not expected to grant certiorari on Question 3. This argument may be skipped.

There was no contempt at all. To say that the contrary was proved beyond a resonable doubt is on the face of the record a denial of Due Process. It is respectfully suggested

the evidence was entirely insufficient. What happened was a misunderstanding. Or even two. --About approaching the bench. About not mentioning former charges versus not mentioning an acquittal by a jury of those charges.

This Court, other federal courts, and other state courts have never been as blindly supportive of the nisi prius court, against a practising attorney, as the Maryland Court of last resort in this case has been.

It is a dangerous thing. This Petitioner is suggesting more, however: he is suggesting that representation by independent counsel not operating under the restraint of fear of an unreasonable court, is so important to every civil right that any court can establish that it is respectfully urged that this Court consider taking the position that charges against an attorney, of contempt, are

of a special constitutional importance; that they are so strongly related to the "Right to the Assistance of Counsel"(as stated in the Sixth Amendment) and to the independence of the bar from any pall of the fear of judicial tyranny which may be laid, that the rule should be thus: Where two possible interpretations of the facts will lie, in the poisement of the attorney's affidavit against the court's charge of contempt, then that interpretation consistent with innocence must, in the exercise of Due Process, be adopted by every court.

Moreover, the Petitioner did not obstruct the court. See Holt v. Virginia, 14 L.Ed. 230, 290. Obstruction is, constitutionally, a necessary element in contempt.

AFTERWORD

Petitioner states, without modesty, that he loves his work,and so, has always won every jury trial he has had, arising out of a domestic case. --Only a dozen to this time --but each was of the utmost difficulty and importance. Particularly, the cases of false charges of child sexual abuse, and of "kidnapping" by fathers.

But though he believes he had a good jury in this case, he did not win.

In this case, he believes, and he alleges that the record will show,that it is at least arguable that it was the aggressiveness of the judge and not the work of the State's Attorney which persuaded the jury to a guilty verdict; and also not the facts.

CONCLUSION

Certiorari should be granted.

God Save the Republic.

Respectfully submitted,

Leonard J. Kerpelman
In Proper Person